No. 16041

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Second Supplemental
Transcript of Record

Appeal from the District Court for the District of Alaska Third Division

FILED
DEC 19 1958
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—12-12-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States Commissioner, Western District of Washington, Northern Division

RECORD OF PROCEEDINGS IN CRIMINAL CASES

Before John A. Burns, Commissioner.

Commissioner's Docket No. 5, Case No. 499

THE UNITED STATES

vs.

CHARLES EDWARD SMITH

Complaint filed on March 14, 1957, by William T. Plummer, Official title U. S. Attorney, charging violation of United States Code, Title 65-6-2 ACLA, Section 1949, on September 1, 1956, at Anchorage, in the Third division of the Territory of Alaska, as follows: Did utter and publish as true a forged payroll check in the amount of $214.36.

Warrants or Summons Issued:

Date March 14, 1957.

Warrant for Charles Edward Smith.

To: U. S. Marshall, Dist. of Alaska, 3rd Div., any of his deputies, or other qualified officer.

Substance of return: Arrested at Seattle, Washington, on March 15, 1957.

Proceedings on First Presentation of Accused to Commissioner:

Date March 18, 1957.

Arrested by T. E. Pass, Sp. Deputy, U. S. Marshal, on warrant of U. S. Commissioner, 3rd Div., Alaska.

Appearances

For United States: None.

For accused: Richard D. Harris, 304 Spring St., Seattle, Wash.

Proceedings taken:

The defendant appeared before me with counsel and the charge in the complaint was read and explained to him. It appeared that defendant had previously signed a waiver of extradition which he and his counsel retracted at the hearing. Proceedings continued at request of defendant's counsel.

On March 19, 1957, the defendant again appeared before me with counsel and withdrew his revocation of waiver previously signed, and stated that he was ready to proceed to Alaska with the arresting officer.

Outcome:

Released to Alaskan authorities.

Bail fixed March 18, 1957.

Amount: $10,000.00.

Bonded: No.

Committed to King County Jail on March 18, 1957.

Certified to be a correct transcript.

Made this 22nd day of March, 1957.

Transmitted to Clerk of United States District Court March 27, 1957.

[Seal] /s/ JOHN A. BURNS,
United States Commissioner.

[Endorsed]: Filed April 8, 1957.

Second Supplemental Transcript of Record start folios at 299. 1st part is set P.U

In the District Court for the Territory of Alaska,
Third Division

No. 3772 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT, and CHARLES E. SMITH,
Defendants.

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors, you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and evidence as given you on the trial. That

oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you because you are the triers of the facts.

1.

By the indictment in this case, the defendants have been charged with the crime of "Uttering a Forged Instrument."

Count I of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously, with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count II of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully, and feloniously with intent to injure and defraud the Kennedy Hardware, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Sport Shop, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count III of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware, did wilfully, unlawfully and feloniously, with intent to injure and defraud the Hub Clothing Company, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count IV of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware did wilfully, unlawfully and feloniously with

intent to injure and defraud the Union Club of Anchorage, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count V of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware, did wilfully, unlawfully and feloniously, with intent to injure and defraud Wallace Burnett and Helen Burnett, owners of The Club, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware, well knowing at the time that the check was false and forged.

Count VI of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker, aka Thomas A. Brown, did wilfully, unlawfully and feloniously with intent to injure and defraud Dukal Enterprises, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Hanover Gift Shop, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond

Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously, with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VIII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Wilma Jones and Cecil Jones, the owners of Hank's Hardware, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count IX of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown,

did wilfully, unlawfully and feloniously, with intent to injure and defraud C. T. Rewak, owner of Tom's Radio Service, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count X of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Robert W. Stratton, Jr., owner of Stratton's Gateway Service, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, well knowing at the time that the check was false and forged.

Count XI of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Roy McKay, owner of McKay's Hardware, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, well knowing at the time that the check was false and forged.

Count XII of the indictment charges that on or about the 1st day of September, 1956, at or near

Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Thomas B. Waters, owner of the Frontier Loan Company, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Sonja Davis and Walter Davis, owners of the Davis Liquor Store, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIV of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Robert J. Shimek and Violet D. Shimek, owners of the Record Shop, The Radio-TV Center, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing,

Count XX of the indictment charges that on or about the 1st day of September 1956, at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams, did wilfully, unlawfully and feloniously, with intent to injure and defraud Gertrude Jurgeleit and Oscar Jurgeleit, owners of the Sheep Mountain Lodge, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine, a forged check, the said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams, well knowing at the time that the check was false and forged.

2.

This indictment is a mere allegation of the charges against the defendants and is not, in itself, any evidence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

To this indictment the defendants, James Burton Ing, Raymond Wright and Charles E. Smith, have pleaded not guilty, which pleas are a denial of the charges and put in issue every material allegation of the indictment.

It, therefore, becomes the duty, and it is incumbent upon the Government to prove every material element of the charges contained in the indictment to your satisfaction beyond a resonable doubt.

The exact date of the commission of the crime charged in the indictment is not material provided the crime was committed within five years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within five years prior to the date of the indictment.

The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendants are guilty beyond a reasonable doubt.

3.

Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate paragraph in the verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendants. They may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

3-A.

You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the

act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such. However, one who is merely present, but does nothing to aid, assist or abet or induce the other to commit the crime is not guilty. It must be shown that he actually participated in its commission from which it follows that if the evidence warrants you may find one of the defendants guilty and the other not guilty. Therefore, if you find from the evidence beyond a reasonable doubt that the defendants, acting either in concert or in pursuance of a previous understanding or common design, committed the crime charged in the indictment, each would be guilty as principal regardless of which of them uttered and published the checks in question, for it is immaterial to what degree any one of them participated in the commission of the crime so long as you find beyond a reasonable doubt that any one knowingly aided, abbetted or assisted the others, or any of the others, in its commission.

4.

In this trial, originally there were six (6) separate individuals named as defendants in the indictment. Three of these defendants, namely, John Walker, Dewey Taylor, and Lemuel Williams have heretofore pleaded guilty to the charges brought against them. Therefore, you are instructed that you are not to concern yourselves with the guilt or innocence of the defendants Walker, Taylor and Williams. You are further instructed that the pleas of guilty as to the defendants Walker, Taylor and Williams

have nothing to do whatsoever with the guilt or innocence of the defendants James Burton Ing, Raymond Wright and Charles E. Smith, and you are not to consider the pleas of John Walker, Dewey Taylor and Lemuel Williams when considering the guilt or innocence of James Burton Ing, Raymond Wright and Charles E. Smith.

You are further instructed that these three (3) defendants, James Burton Ing, Raymond Wright and Charles E. Smith, were jointly charged and placed on trial together, and you are to consider the charges as applying to all of them together as well as to each one separately insofar as each separate count charges all three (3) defendants; and on those counts that do not charge all three (3) jointly and separately, then you are instructed to consider only those defendants named in that particular count or counts.

5.

The laws of Alaska provide "* * * That if any person shall, with intent to injure or defraud anyone, falsely make, alter, forge, counterfeit * * * any check * * *; or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, counterfeited * * * instrument, or matter whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary * * *"

Counts I through XX of the indictment are brought under these provisions of the law.

6.

In this case, the Government relies in part upon the testimony of admitted accomplices.

You are instructed that an accomplice is one who, being of mature age and in possession of his natural faculties, co-operates with or aids or assists another in the commission of a crime.

With respect to such testimony, the laws of Alaska provide as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission."

The provision of Alaska law which is quoted means that the corroborating evidence required to be given before conviction can be had must, in itself, and independent of all accomplice testimony, tend to connect the defendants with the commission of the crimes charged against them, and must tend to show not only that the crimes have been committed, but that the defendants were implicated in them. Corroborating testimony need not be direct; it may be circumstantial; and, whether direct or circumstantial, if it corroborated the testimony of an accomplice in a material particular and tends to connect the defendants with the crimes charged, it is suffi-

cient to meet the requirements of the statute and support a conviction.

This law does not mean that the corroborative evidence alone must be sufficient to justify conviction, but it does require that unless in your judgment the corroborative evidence alone and by itself tends to connect the defendants with the crimes charged, the defendants should be acquitted, no matter how convincing the accomplice testimony may be.

If you find that the corroborative evidence alone, if any, does tend to connect the defendants, or any of them, with the commission of the crimes charged against them, then you should consider all of the evidence against such defendant or defendants, including all accomplice testimony, and if all of the evidence, including both that of the accomplices and that of the corroborative testimony, convinces you beyond a resonable doubt of the guilt of the defendants, or any of them, you should render a verdict accordingly; otherwise the defendants, or any of them, should be acquitted.

Section 58-5-1, Compiled Laws of Alaska, 1949, provides in part as follows:

> "That the testimony of an accomplice ought to be viewed with distrust."

You are accordingly instructed that the testimony of the government witnesses, self-confessed accomplices in the commission of the crimes charged in the indictment in the case now on trial before you, ought to be viewed with distrust.

7.

You are hereby instructed that before you can find the defendants, or any of them, guilty of the charges set forth in each individual count of the indictment, the Government must prove:

First, that the crimes, if any, in Counts I through XIX, were committed at or near Anchorage, Third Judicial Division, District of Alaska, on or about the 1st day of September 1956, and that the crime, if any, charged in Count XX of the indictment, was committed at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, on or about the 1st day of September 1956;

Second, that at said times and places, the defendants, or any of them, did knowingly, wilfully, unlawfully, fraudulently and feloniously, with intent to injure and defraud, falsely make, forge and counterfeit checks for the payment of money drawn on the First National Bank of Anchorage, the tenor and purport of which are set out in the indictment in this case;

Third, that the signatures written on the face of said checks purported to be genuine signatures of the makers thereof, whereas in truth and in fact said checks were not signed by the consent or authority of the purported makers, and that the names of the purported makers of the checks were actually signed to said checks by some other person.

Fourth, that the defendants, or any of them, at the said times and places set forth in the indictment,

having in their possession checks with false, forged and counterfeited signatures written on the faces thereof, drawn on the First National Bank of Anchorage, copies of which appear in each count of the indictment, and purporting to have been signed by persons other than the defendants, did, with intent to injure and defraud, wilfully, feloniously, knowingly and unlawfully utter and publish as true and genuine to the business concerns listed in the various counts said false, forged and counterfeited checks;

Ffth, that the said defendants, at the times of uttering and publishing said checks to the business concerns listed in the indictment, knew that said checks had not been signed by the persons represented on the checks, or by the consent or with the authority of such persons, but that the signatures of such persons on said checks were forged, counterfeited and false.

If the Government has proved each and all of the essential elements of the crimes charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendants guilty of the crimes charged in the indictment, but if the Government has failed to prove any of the essential elements of the crimes charged in the indictment to your satisfaction beyond a reasonable doubt, then you should acquit the defendants or such of the defendants as you find there has been no proof against, as stated above.

8.

"Forgery" may be defined as the fraudulent

making or altering of any writing to the prejudice of another person's rights.

To "utter" a check means to offer it, to attempt to pass it, and to "publish" a check means to pass and deliver it to another as good and genuine. To "utter and publish" a forged check means not only that it is offered but that it is passed and delivered to another as being a good and genuine check. The allegation that defendants, or any of them, did "utter and publish" a certain check or checks alleged to have been forged is supported by any evidence that they offered to pass or deliver said check or checks and did pass and deliver them to some other person as genuine instruments, declaring or asserting, directly or indirectly, by words or acts, that the check or checks were good.

As used in the indictment in this case, the word "wilfully" means knowingly, intentionally and designedly.

The word "feloniously" means with criminal intent and evil purpose.

The word "unlawfully" means wrongfully or contrary to law.

"Defraud" means to cheat or to deprive of, and applies to both property and rights. The phrase "intent to defraud" as used in this case means a purpose on the part of defendants, or any of them, to cheat or dishonestly deprive some person of money.

"Knowingly" means with knowledgee. In cases such as this, it implies not only knowledge but bad purpose and evil intent.

9.

In every crime, such as charged in this case, there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

A person is held to intend every act which is knowingly done. An act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

A person is also held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend whatever consequences should reasonably be expected to result from every act which is knowingly done.

10.

A resonable doubt is a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, or from lack of evidence, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.

The very use of the word "reasonable" in the term "reasonable doubt" indicates that by a reasonable doubt is not meant any vague, formless, or

imaginary doubt or conjecture which may come into your minds, or which may be created out of sympathy for the accused or another, or out of kindness of heart.

A resonable doubt must be a substantial doubt, such as an honest, sensible, fairminded person, animated by a conscientious desire to ascertain the truth, may with reason entertain.

If, after examining carefully all the facts and circumstances in the case, in the light of the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt; but if you do not have such a conviction of the defendant's guilt, then you should acquit.

11.

In this case, the defendants have elected not to take the witness stand. You are hereby instructed that under the law they have this right not to take the witness stand if they so elect, and you are instructed that you are not to draw any unfavorable inference against them on that account.

12.

Some of the evidence in this case is of the type called circumstantial, as distinguished from direct evidence. Direct evidence is given when a witness testifies of his own actual and personal knowledge to the facts in issue and to be proved. Circumstantial evidence is given when a witness testifies in like

manner to facts from which may be inferred the facts in issue and to be proved. Accordingly, circumstantial evidence may be defined as that type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. Circumstantial evidence is sometimes quite as convincing as direct evidence; in other cases, less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be inconsistent with any other reasonable theory than that of guilt.

In this case the proof consists of both direct and circumstantial evidence. Both should be carefully considered. It is for you to determine the weight of the circumstantial evidence as well as of the direct evidence, neither enlarging nor belittling the force of either; and if all of the evidence, when taken as a whole and fairly and candidly weighed, convinces you beyond reasonable doubt of the defendant's guilt, a verdict finding the defendant guilty should be returned accordingly; otherwise, the defendants should be acquitted.

13.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the

Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which included questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

14.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity; or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a

fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

15.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

16.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No jurors should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

17.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to

any other subject coming under your consideration and demanding your judgment.

18.

At the close of the trial, counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

19.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

20.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

21.

Upon retiring to the jury room, you will elect one of your number foreman who will speak for you and sign the verdict agreed upon. You will take with you to the jury room these instructions, the exhibits, and the three forms of verdict which have been prepared for your use.

If you find the defendant, James Burton Ing, guilty of the crime charged in Count I of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 1. If you find the defendant, James Burton Ing, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II through XX of the indictment. Your foreman will thereupon date and sign Verdict No. 1 and return the same into court as your verdict.

If you find the defendant, Raymond Wright, guilty of the crime charged in Count I of the in-

dictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 2. If you find the defendant, Raymond Wright, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II through XX of the indictment. Your foreman will thereupon date and sign Verdict No. 2 and return the same into court as your verdict.

If you find the defendant, Charles E. Smith, guilty of the crime charged in Count I of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 3. If you find the defendant, Charles E. Smith, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II, III, IV and V of the indictment. Your foreman will thereupon date and sign Verdict No. 3 and return the same into court as your verdict.

If you unanimously agree upon your verdicts during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign them and return them into open court in the presence of the entire jury, together with these instructions. If, however, you agree upon your verdicts after business hours, that is, after 5 p.m. one day

and before 9 a.m. the following day, you should similarly have your foreman date and sign them and seal them in the envelope accompanying these instructions. The foreman will keep this envelope in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdicts will be received from you in the usual way.

Given at Anchorage, Alaska, this 27th day of February, 1958.

/s/ J. L. McCARREY, JR.,
U. S. District Judge.

[Endorsed]: Filed February 28, 1958.

TRANSCRIPT OF EXCERPT OF PROCEEDINGS ON TRIAL

* * *

The Court: Counsel may come to the bench and take exceptions, if any they have, to the instructions prepared by the Court.

(Thereupon, all counsel approached the bench together with the Court Reporter and the following proceedings were had out of the presence of the jury:)

The Court: Mr. Plummer, do you have any——

Mr. Hepp: Before objections are taken up, I'd like to be heard on a certain matter.

(At this time another matter, other than the exceptions to the instructions, was heard, after which the following proceedings were had out of the presence of the jury:)

The Court: Now, Mr. Plummer, do you have any exceptions?

Mr. Plummer: The only exception I have, your Honor, is that I have no exception at all to the instructions as they are presented. I would like an exception—or, I feel that the proposed instruction of the prosecution should have been included to show that his actual presence at the time of the passing of the checks was not necessary to make him a principal in the matter. I did submit a proposed instruction which is just—I took it right out from the Territorial Statute and I did not run across it there and I think it properly should be. I am afraid the jury will think, "Well, if he was down someplace else and the checks were cashed, that although he might have been guilty of conduct—aiding their passing—and so he need not be guilty as a principal in crime," which is the reason I made the requested instruction and I do feel it should be in there. It's, in fact, a quotation from the Territorial Statute.

The Court: Well, as a matter of fact, the Court ordinarily gives that and that fact had been overlooked. Miss Turner.

(Thereupon, the Court had an off-the-record discussion with his secretary, after which the following proceedings were had out of the presence of the jury:)

The Court: Mr. Plummer——

Mr. Plummer: With that exception, I have no other comment to make, your Honor.

The Court: Very well. Mr. Hepp.

Mr. Hepp: I have none. I believe Mr. Kay and Mr. Nesbett have some that I may join in.

The Court: Mr. Gore, do you have any?

Mr. Gore: I'd like to——

The Court: Well, maybe we better wait for Mr. Kay, though. Mr. Kay, now, do you take any exceptions?

Mr. Kay: I take exception to the emphasis in Instruction No. 2. I feel that the last paragraph, mainly the very vital statement of the presumption of innocence, should be afforded a separate instruction. I feel that tagging it on after an instruction relative to the fact that it's immaterial whether the crime was relative to the time element doesn't give the proper emphasis—doesn't give the—on the presumption of innocence and should be given a separate instruction.

The Court: Let the exception be noted.

Mr. Kay: Now, as to Instruction 6, I feel that Instruction 6 possibly—or, I will strike the "possibly." Instruction 6 correctly states the law where there is a question as to whether or not a particular individual is or is not an accomplice.

However, in this case, where the evidence is clear and uncontradicted and there is no conflict in the evidence, the question of who is an accomplice is a question of law for the Court. Here, there was no conflict. The evidence was undisputed and therefore, it would become the duty of the Court to instruct that Walker and Taylor was a participant in the crime.

The Court: Walker and who?

Mr. Kay: Dewey Taylor. It would be equally the duty of the Court, though Brownfield admitted a participation in the forgery of the checks——

The Court: Pardon me, Mr. Kay. You say that Brownfield is an accomplice, although the charge is for uttering and publishing * * *

Mr. Kay (Continuing): Uttering and publishing forged checks. Now, who forged those checks? Brownfield did.

The Court: But it was uttering and publishing, not forging.

Mr. Kay: Anyone who participates as an accessory before the fact is a principal under the Alaska Statute—guilty as a principal. Anyone who is guilty as a principal is an accomplice. Now, who could, or might, be guilty as a principal? Anyone, therefore, who engaged, assisted, aided or participated in the commission of this crime which is the preparation of these—involves everything, includes the transportation, the forging of these checks, the preparation of them, the distribution of them and the passing of them. If he aided and assisted in any way, he is an accessory before the fact and an accomplice and I think that the law—the facts are undisputed

and clear and I think the Court should instruct that Brownfield was an accomplice.

The Court: Mr.——

Mr. Kay: In that regard, I except to the failure of the Court to give the proposed instruction submitted by the Defendant Ing this morning, stating that the Defendant Walker and the Witness Brownfield were accomplices—failure to give that instruction, and I believe it is——

The Court: Did you have any other exception?

Mr. Kay: No.

The Court: Mr. Nesbett.

Mr. Nesbett: Only, your Honor, to except to the failure of the Court to give any instruction to the effect that admissions made by a defendant while in custody must be voluntarily and that the burden of proving the voluntary nature of the statements is on the Government and I realize I didn't submit one on those points, your Honor, and—well, that is all I have to say.

Instruction 2—there is vital information there and you left out the word "not" in front of the word "guilty", I believe, your Honor.

The Court: Point that out to me, please.

Mr. Nesbett: I don't have the page numbers; I can't tell, but it's on this (indicating) instruction, Line 2, Paragraph 2.

The Court: Let the record show the Court has now inserted the word "not guilty" as requested by counsel for the Defendant, Mr. Smith. Very well. Did you wish to be heard further?

Mr. Plummer: No.

(Thereupon, the Court reads the instructions to the jury, after which the following proceedings were had:)

Mr. Plummer: May counsel approach the bench, your Honor, just briefly—just one more time?

The Court: Very well.

(Thereupon, all counsel approached the bench together with the Court Reporter and the follow proceedings were had out of the presence of the jury:)

Mr. Plummer: Will you turn to No. 7? Would you look at the last line and the fourth paragraph?

The Court: Line what?

Mr. Plummer: Line 23.

The Court: Yes.

Mr. Plummer: It says, "checks by one of the defendants". I think we are getting instructed right out of Court. I didn't notice it and I am sorry.

The Court: What would you propose?

Mr. Plummer: If we would just write in there, "by some one else" and delete "by one of the defendants".

The Court: Any objection?

Mr. Kay: Let me read it, your Honor. I can't understand what is going on.

Mr. Plummer: See, we are not charging with forgery?

The Court: Yes. Would you object if it were put, "by some other person"?

Mr. Plummer: That would be fine.

The Court: Without objection, the Court has

changed Line 23 to now read "* * * said checks by some other person".

Mr. Plummer: I'm sorry, your Honor, I didn't catch it.

The Court: Yes. Well, that is inadvertence on the part of the Court's secretary in drawing the original.

Mr. Nesbett: And delete the words, "one of the defendants?"

The Court: Yes, "by some other person."

(Thereupon, all counsel, together with the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the jury:)

The Court: Will the bailiffs please come forward?

* * *

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of excerpt of proceedings in the above-entitled taken by me in stenograph in open court at Anchorage, Alaska, on the 27th day of February, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed November 12, 1958.

[Endorsed]: No. 16041. United States Court of Appeals for the Ninth Circuit. Charles E. Smith, Appellant, vs. United States of America, Appellee. Second Supplemental Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed November 25, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.